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No. 662

Supreme Court of the United States

October Term, 1941

WILLIAM (BILL) FLIPPIN, JACK BAUGH AND TUDE PURKEY,
Petitioners,

VS.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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Supreme Court of the United States

October Term, 1941

No. ------

WILLIAM (BILL) FLIPPIN, JACK BAUGH AND TUDE PURKEY,
Petitioners,

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

I.

Summary Statement of Matters Involved.

COME Now, William (Bill) Flippin, Jack Baugh and Tude Purkey, petitioners herein, and praying for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit, respectfully show unto the Court that they were convicted in the United States District Court in and for the Fort Smith Division of the Western District of Arkansas for violation of Sec. 88, Tit. 18, U.S.C.A., i. e., conspiracy to violate Sec. 3 of the Liquor Enforcement Act of 1936 (27 U.S.C.A. 223) and that on the 29th day of June, 1940, petitioners were sentenced by the trial court as follows, to-wit:

William (Bill) Flippin, two years imprisonment and a fine in the sum of $2,500.00;

Jack Baugh, eighteen months imprisonment and a fine in the sum of $1,000.00; and

Tude Purkey, one year and one day's imprisonment and a fine in the sum of $500.00. (R. 23-25).

The cause in the trial court was styled *"The United States of America, Plaintiff,* vs. *William (Bill) Flippin, Jack Baugh and Tude Purkey, Defendants,"* the same being No. 4075 on the Criminal Docket of said court (R. 1).

The indictment was returned by the Grand Jury on the 21st day of February, 1940, the first count thereof charging petitioners, from on or about the 7th day of December, 1938, and continuously thereafter until on or about the 17th day of October, 1939, with having conspired together and with one Harry E. Mann and Tom Gilbert (who were not indicted) to violate said Act, the substance of the charges being that the petitioners, together with the said Mann and Gilbert, conspired together for the purpose of illegally importing, bringing and transporting intoxicating liquors from the State of Arkansas into the State of Oklahoma.

The indictment contained six additional counts, each charging petitioners with substantive offenses against said Act in the illegal transportation of intoxicating liquor from the State of Arkansas into the State of Oklahoma, however, petitioners were acquitted on all counts except the first count, i. e., the conspiracy charge, and hence this petition for Writ of Certiorari is limited to the conviction of petitioners on the first count of the indictment.

On March 11, 1940, petitioners filed their separate demurrers to the indictment, the same in substance alleging

that the indictment wholly failed to state facts sufficient to charge the commission of any public offense against the laws of the United States; that the court was without jurisdiction of the persons or the subject matter of the action; that the liquor laws of the State of Oklahoma were unconstitutional and invalid and that *the Liquor Enforcement Act of 1936 had no application to the importation of liquor into the State of Oklahoma* (R. 9-13).

On March 11, 1940, said demurrers were overruled by the court and exceptions taken, whereupon petitioners entered pleas of not guilty (R. 13-14).

On June 10, 1940, by permission of the court, petitioners withdrew their pleas of not guilty and, through additional counsel, filed a joint demurrer to the indictment alleging in substance, insofar as the same applied to the first count of the indictment, that the same failed to charge a violation of any valid, constitutional or subsisting law of the United States and that at the time of the alleged offense there was no valid constitutional or subsisting law in the State of Oklahoma prohibiting the *sale* of such beverages as referred to in the Federal Statute (R. 14-15).

This demurrer was overruled by the court and exceptions taken and thereupon pleas of not guilty re-entered by petitioners (R. 15-16).

On June 12, 1940, petitioners were found guilty by the jury as to the First Count of the indictment and not guilty as to the remaining six counts thereof (R. 16-18).

On June 14, 1940, petitioners filed their motion for a new trial for the reasons set forth in said motion, which was overruled by the court and exceptions taken (R. 18-23).

On July 8, 1940, petitioners Baugh and Purkey duly executed appeal bonds which were approved by the court (R. 28-30). On September 24, 1940, petitioner Flippin duly executed appeal bond, likewise approved by the court (R. 26-28).

At the close of the government's case, petitioners demurred to the evidence and moved the court to instruct the jury to return a verdict of not guilty as to each of the petitioners, which demurrer and motion, insofar as the same is applicable to the first count of the indictment, was overruled by the court and exceptions taken (R. 105-106).

At the close of all of the evidence, petitioners renewed their demurrer and their motion for a verdict of not guilty, said demurrer and motion being overruled by the court and exceptions noted (R. 115-116).

The Bill of Exceptions was duly signed by counsel for both parties and approved, settled and signed by the Hon. Harry J. Lemley, District Judge, on the 20th day of September, 1940, (R. 132), the trial judge, the Hon. Heartsill Ragon, having died in the interim.

Notice of Appeal under Rule III was duly given on the 2nd day of July, 1940, setting forth the grounds of appeal, service thereof having been accepted by counsel for the government on the 1st day of July, 1940 (R. 1-4).

Appeal from the judgment and sentence of the trial court was duly taken to the United States Circuit Court of Appeals for the Eighth Circuit, the cause there being Number 11,785, Criminal, styled "*William (Bill) Flippin, Jack Baugh, and Tude Purkey, Appellants,* vs. *United States of America, Appellee,*" which was presented by brief and oral

argument on March 17th, and 18th, 1941, and which judgment and sentence of the trial court was affirmed by the Circuit Court of Appeals on July 16, 1941 (R. 156-166).

Petition for rehearing was filed in the Circuit Court of Appeals on the 31st day of July, 1941 (R. 167-177), and the same denied by the Circuit Court of Appeals on the 28th day of August, 1941 (R. 179).

The principal matter and question involved is whether the Liquor Enforcement Act of 1936 was at the time of the alleged offense applicable to the importation of intoxicating liquors from the State of Arkansas into the State of Oklahoma.

The Federal Statute, (as hereinafter more fully set forth) made it a violation to transport intoxicating liquor into any state in which all *sales* of intoxicating liquor containing more than four per centum of alcohol by volume were prohibited. The statute further provides that the definition of intoxicating liquor contained in the laws of such state into which imported shall be applied only to the extent that *sales* of such intoxicating liquor are prohibited in such state. The laws of the State of Oklahoma define intoxicating liquor as being such that contains more than 3.2% of alcohol by *weight,* no *volumetric* measure being used in the laws of the State of Oklahoma insofar as the same pertains to *sales* thereof.

The record in this case in the trial court is devoid of proof as to the relative alcoholic content of a beverage containing 4% of alcohol by volume and a beverage containing 3.2% of alcohol by weight.

Although it is deemed that the foregoing is the important matter and question herein involved, the other

questions hereinafter set forth are seriously urged and not waived.

The specifications of error and points relied upon in the appeal from the trial court to the Circuit Court of Appeals, and herein involved are as follows:

1.

The trial court erred in overruling the demurrer to the evidence and in refusing to instruct the jury to return a verdict of not guilty in that the evidence was insufficient and the record was and is devoid of proof as to the relative alcoholic content of a beverage containing 4% of alcohol by volume and a beverage containing 3.2% of alcohol by weight.

2.

The Liquor Enforcement Act of 1936 was and is inapplicable to the transportation of liquor into the State of Oklahoma and the demurrer to the indictment should have been sustained.

3.

The trial court erred in failing and refusing to charge the jury as requested in the special requested instructions of petitioners, Nos. 2, 3, 4, 5 and 6.

4.

The trial court erred in permitting the government to interrogate its witness, Tom Gilbert, in an attempt to impeach him as to his testimony before the grand jury and the court erred in overruling the motion for a mistrial by virtue of his testimony.

5.

The judgment and sentence of the trial court was contrary to law and the admissible evidence adduced in the trial of said cause.

The Circuit Court of Appeals, from which this review is sought, in two cases, shortly prior to the consideration of

this case, wherein the transportation of intoxicating liquor into the State of Kansas (which state defines intoxicating liquor, insofar as sales are concerned, as being 3.2% of alcohol by weight, the same as in Oklahoma), held where the record in the trial court was devoid of proof as to the relative alcoholic content between a beverage containing 4% of alcohol by volume and one containing 3.2% of alcohol by weight, that the convictions should be reversed.

The Circuit Court in those cases held that it could not take judicial knowledge of the relative alcoholic content of the two beverages and that the problem presented was one of translating terms used in the Federal Statute into the terms used in the State Statute. These cases, hereinafter more fully referred to, are *Arnold* vs. *United States*, 115 Fed. (2d) 523, and *Gregg* vs. *United States*, 116 Fed. (2d) 609.

Thereafter, the same Circuit Court of Appeals, in the case of *Dolloff* vs. *United States*, 121 Fed. (2d) 157, affirmed the conviction in a similar case, but in that case there was proof in the trial court of the relative alcoholic content of a beverage containing 4% of alcohol by volume and of a beverage containing 3.2% of alcohol by weight and wherein the trial court found on the evidence introduced that the two beverages contained substantially the same alcoholic content.

We call the Court's attention to the above cases in order that it may have before it the same in the consideration of the opinion of the Circuit Court of Appeals herein.

The Circuit Court of Appeals based its affirmance of this case, as we interpret the same, substantially on the fol-

lowing grounds: (1) That since the decision of the same Circuit Court in the Arnold and Gregg cases, *supra*, the court reached the conclusion "*based upon the evidence before it*," that an alcoholic beverage containing 3.2% of alcohol by weight contained substantially 4% of alcohol by volume and that by recognized scientific authorities and the legislative history of the enactment of the Liquor Enforcement Act, the court would take judicial notice as corroborative of that *evidence*, and, therefore, that the Liquor Enforcement Act is applicable to the State of Kansas and Oklahoma; (2) that it is suggested by the court that a difference exists between the bases underlying the public policies of the States of Kansas and Oklahoma in their attitude toward intoxicating liquors and that prior to the admission of Oklahoma as a state into the union, a large part of its area was known as Indian Territory, and that by virtue thereof the federal government, in undertaking to protect the Indians, was exacting in its duty toward its wards; (3) that the Enabling Act, in connection with the admission of Oklahoma into the Union, provided that intoxicating liquor could not be sold in the state for a period of twenty-one years after the admission of the state into the Union (1907), and not thereafter until legally and constitutionally provided for; (4) that the committee reports in Congress in connection with the passage of the Act and the so called Cullen Beer Bill referred to beer, lager, ale, porter, or other similar liquors containing 3.2% of alcohol by weight as being equivalent to 4% of alcohol by volume; (5) that it is a matter of common knowledge that commercial whiskey has an alcoholic content in excess of any allowable per centum under the statute; (6) that as to the other errors

complained of, while the court finds informality in the charge of the court, the case was submitted as to preclude any misunderstanding on the part of the jury; and, (7) that the Circuit Court finds that the Liquor Enforcement Act of 1936 is applicable to the State of Oklahoma.

The Dolloff case, *supra*, was decided by the Circuit Court subsequent to the argument of this case before the court, and consequently petitioners filed their petition for rehearing herein showing the apparent distinction between that case and the case at bar, and also fully answered the opinion of the Circuit Court, all of which will be more fully treated in the supporting brief to this petition.

II.

Reasons Relied on for the Allowance of the Writ.

1. The decision of the Circuit Court of Appeals herein involves an important question of federal law as to an interpretation of an important federal statute which has not been construed by this Court, and which decision of the Circuit Court of Appeals is such as to warrant and call for an exercise of this Court's power of supervision.

2. The decision of the Circuit Court of Appeals herein involves an important question of federal procedure such as to warrant and call for an exercise of this Court's power of supervision in that in this case the record in the trial court was *devoid of proof* of an essential part of the charges in the indictment which proof the government did not make and in which the Circuit Court took upon itself the authority of making findings of fact, *de novo*, which under the law and the constitution was a burden upon the prosecution to establish in the trial court and for the jury to determine the

same. See *Edwards* vs. *United States*, 61 Sup. Ct. Rep. 669, 81 Law. Ed. 563, recently decided by this Court.

3. The decision of the Circuit Court of Appeals herein in affirming the action of the trial court in overruling the demurrer to the indictment, which indictment contained an erroneous charge of law, i. e., that the State of Oklahoma prohibited the sale of intoxicating liquor containing more than 4% of alcohol by volume, whereas the laws of the State of Oklahoma only prohibited the sales of intoxicating liquor containing an excess of alcohol of 3.2% of alcohol by weight, involves an important question of federal law and is an erroneous decision on an important question of general law in conflict with the weight of authority and probably in conflict with applicable decisions of this Court.

4. The decision of the Circuit Court of Appeals herein is directly in conflict with two prior decisions by the same Circuit Court of Appeals, i. e., *Arnold* vs. *United States*, 115 Fed. (2d) 523, and *Gregg* vs. *United States*, 116 Fed. (2d) 609, in which the situation in those cases and the instant one are practically identical and as such warrant and call for this Court's power of supervision.

5. The decision of the Circuit Court of Appeals herein involves a most important question of federal law in that in the opinion and decision of the court it bases, in part, its opinion on the fact that the State of Oklahoma occupies a position of *"pronounced difference"* between other states in that the federal government has had and has many Indian wards in said State of Oklahoma and in various acts of legislation has been exacting *"in the maintenance of its duty and undertaking to protect its Indian wards."*

6. The decision of the Circuit Court of Appeals herein involves an important question of federal procedure in that in its decision and opinion, the court states *"based upon evidence before it"* that it has reached the conclusion that an alcoholic beverage containing 3.2% of alcohol by weight contains substantially 4% of alcohol by volume, whereas the record in the trial court was and is *devoid of proof and there was no evidence* as to the relative alcoholic content of beverages, one measured by *weight* and the other by *volume.*

7. While there is no conflict between the various Circuit Courts of Appeal, there is a conflict between the various District Courts, in addition to the conflict in the same Circuit Court of Appeals. See *United States* vs. *Robason,* (D.C. Kan.) 38 Fed. Supp. 991, where it was held that the Liquor Enforcement Act of 1936 applied to the State of Kansas (our view being that insofar as here applicable, the laws of Kansas and Oklahoma are substantially the same) but the court in that case stated as follows:

> "It is interesting to note that in the neighboring state of Missouri the District Judges are not in agreement concerning the Kansas law.
>
> "In United States vs. 1940 Model Dodge Coupe, Motor No. D14-191545, No. 674, Judge Merrill E. Otis was of the opinion that the Kansas statute was insufficient.
>
> "On the other hand, Judge Albert Reeves on January 14, 1941, in United States vs. Arnold, D. C., 38 F. Supp. 863, was of the opinion the Kansas law qualified Kansas for protection under the Twenty-First Amendment and the Liquor Enforcement Act of 1936."

(The last above mentioned case, i. e., *United States* vs. *Arnold,* was reversed by the Circuit Court of Appeals from which a review is sought herein, holding

that the Liquor Enforcement Act of 1936 was inapplicable to the State of Kansas.)

8. If the basis of the Circuit Court's affirmance of the petitioners' convictions is that its examination of the Congressional Report convinced it that Congress intended the Liquor Enforcement Act of 1936 to apply to states which only prohibited all sales of intoxicating liquor containing more than 3.2% of alcohol by weight and that therefore, the act would be construed to apply to the State of Oklahoma, then the Circuit Court decided a Federal question in a way probably in conflict with applicable decisions of this Court because the act is not ambiguous as to its definition of the states affected by it and under such circumstances, the fact that Congress may have intended something else as shown by Congressional Reports and debates and other data cannot be considered. *Merritt* vs. *Welsh*, 104 U. S. 694, 702-703; *Hamilton* vs. *Rathbone*, 175 U. S. 414, 419; *Thompson* vs. *United States*, 246 U. S. 547, 550.

9. The decision of the Circuit Court of Appeals herein in making its independent investigation and finding of the relative alcoholic content of beverages containing "3.2% of alcohol by weight" and "4% of alcohol by volume," where the record in the trial court was devoid of proof, is one involving an important federal question in a way probably in conflict with applicable decisions of this Court and, further, such that it has so far departed from the accepted and usual course of judicial proceedings as to call for this Court's power of supervision. While courts may take judicial knowledge of certain well known established facts, such action and decision of the court in taking judicial

knowledge of the relative alcoholic contents of all of the various kinds of beverages charged in the indictment as being imported goes beyond the requirement of the law imposed upon the courts to exercise this power with caution, and as such the decision of the Circuit Court of Appeals herein is a conclusion different than would be justified where, as here, there was no evidence whatsoever in the trial court upon the subject.

WHEREFORE, your petitioners respectfully pray that a Writ of Certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals for the Eighth Circuit had in this case, numbered and entitled on its docket as No. 11,785, Criminal, "*William (Bill) Flippin, Jack Baugh, and Tude Purkey, Appellants,* vs. *United States of America, Appellee,*" to the end that this case may be reviewed and determined by this Court as provided for by the statutes and laws of the United States of America; and that the judgment herein of the United States Circuit Court of Appeals for the Eighth Circuit and that of the United States District Court for the Western District of Arkansas be reversed by this Court, and for such other and further relief as to this Court may seem just and proper.

Dated, this 22 day of September, A. D. 1941.

J. FORREST MCCUTCHEON,
1023 Texas Bank Building,
Dallas, Texas,
Attorney for Petitioners.

Certificate of Counsel

I, the undersigned, J. Forrest McCutcheon, Attorney for Petitioners herein, a Member of the Bar of the Supreme Court of the United States, hereby certify that I have carefully examined the record herein and in the light of its contents consider this Petition for Writ of Certiorari well founded, and that it is not interposed for the purpose of delay.

J. Forrest McCutcheon,
Attorney for Petitioners.